No. 05-19-00911-CV

IN THE COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT
DALLAS, TEXAS

In re Ashley Pardo and Daniel Pardo, individually and as next friends for KDP, a minor,

Relators

PETITIONERS' REPLY TO RESPONSE TO PETITION FOR WRIT OF MANDAMUS

From Kaufman County District Court
Kaufman County, Texas
Hon. Mike Chitty, 422nd District Judge
Cause No. 102717-CC

Respectfully Submitted:

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SUMMARY OF ISSUES

It is important to understand there are two ***separate*** – albeit intertwined – issues being addressed in this proceeding.

The first, critical issue relates to evidence, or in this case, the lack thereof. This issue then triggers inquiry into present harm versus fears of future harm, recognizing there can be no evidence of something that has not happened yet. Dealing with past and present facts instead of speculation about the future reveals that the Pardos have always followed the medical advice of KDP's physicians. And because of this, the trial court abused its discretion by making its ruling based on unsubstantiated fears about the future.

The second issue relates to whose actions are under review here, those of CPS or those of the trial court. In a mandamus proceeding, of course, only the rulings of the trial court are under review; the illegal actions of CPS will be dealt with in another forum.

The third and final issue relates to the burdens of proof. CPS seems to think that if the trial court acted properly on June 20 in taking the child ***initially***, during an *ex parte* hearing, its decision must be carried over whole following the July 2 hearing and its refusal to ***return*** the child

is thus "supported."[1] This is incorrect. We are here today addressing the evidence related to the subject July 24 order that resulted from the July 2 hearing, in which the trial court was required by statute to return KDP to his parents. Whatever happened in June 20 hearing is irrelevant because the evidence submitted during the *ex parte* June 20 hearing by CPS went unchallenged, including the "diagnosis" by Dr. Dakil of medical child abuse. On cross-examination at the July 2 hearing, however, Dr. Dakil backed off of that diagnosis, yet CPS still cites it as grounds for the ***continuation*** of CPS custody after July 2 (Response, p. 3). Indeed, Dr. Dakil was quite a bit more forthcoming on many issues during cross examination on July 2, 2019 than she had been in her written report or in her unchallenged testimony on June 20.

CPS puts this whole matter into proper perspective in only a few sentences found in the Response, p, 19:

Dr. Dakil testified that, prior to the child's removal, she was

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[1] If this were true, then why have the July 2 hearing at all? Obviously, the purpose of the July 2 hearing was to vet the accusations made by CPS at the June 20 *ex parte* hearing to see if any evidence supported those accusations. Accusations are a poor substitute for evidence, which is why we have speedy ***evidentiary*** hearings in these cases and do not make these types of decisions based solely on accusations which are often unfounded, either intentionally or inadvertently. The cross examination and submission of all of the evidence submitted at the July 2 hearing must therefore be given appropriate weight.

> concerned that "if we didn't have access to the child, that if we couldn't work with the family, we couldn't assure that [KDP] did or did not get a feeding tube appropriately." RR 1:140. As to the risk to the child at the time of removal, Dr. Dakil was concerned that the Pardos would go to another facility that "would put in a [G-tube] in this kid without adequate evaluation." RR 1:140.

Just so. This entire proceeding hinges not on any facts or actions of the Pardos, nor on the possible future actions of a competent physician who might properly diagnose the medical necessity of a G-tube for KDP. Rather, it rides on Dr. Dakil's admittedly-unfounded speculation that there may be a physician out there, somewhere, who will somehow be convinced by Ashley Pardo to perform surgical procedures on KDP that this mystery physician also believes are ***not*** necessary. Pure speculation has never been better described. REC 178 (question posed to Dr. Dakil discussing the alleged plan to find a doctor who would insert a G-tube):

> Q: My question was what evidence do you have that that was their plan?
> A: I have no evidence that that was their plan.

Dr. Dakil does not fear the Pardos. Instead, she fears a phantom practitioner who might do something Dakil does not feel is necessary, at some unknown time in the future, even though she is not qualified to opine on medical necessity related to a G-tube because she is not a

gastroenterologist and because she has never been KDP's treating physician or asked for a consult by his treating physicians. Giving medical opinions without examining the patient and without the proper qualifications is not only ridiculous, but it is a breach of medical ethics and constitutes malpractice.[2]

Once the proper focus is applied and the two rounds of hearings are given their proper perspective, the issues are seen clearly and the proper decision of this Court is obvious: the trial court abused its discretion in issuing the July 24, 2019 Order in which it refused to return KDP to his parents as required by statute, and a writ of mandamus must issue if the trial court refuses to set that order aside.

RESPONSE TO REAL PARTY'S SUMMARY OF ARGUMENT

Literally nothing found in the "Summary of the Argument," Response, pp. 35-36, is true. The following quotes from the Response are in italics, followed by the actual evidence.

> *"This case involves concerns of medical child abuse by the Relators."*

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[2] The Department says that Dr. Dakil offered other uninformed opinions, such as that KDP "[a]bsolutely" did not need a wheelchair." Response, p. 14; REC 139. It is never explained how Dr. Dakil is qualified to countermand this prescription made by another, treating physician.

Not true. The only medical opinion relied on by the trial court was that of Dr. Dakil, and she does not subscribe to the State's diagnosis or "concern" of medical child abuse, nor that there was any urgency to remove KDP from his parents.[3] Instead, not only did Dr. Dakil not recommend, or even approve of, KDP's removal from his parents, any medical opinion she offers is by definition unfounded because she had not examined KDP before she wrote her report/affidavit and she has not been shown qualified by specialty to opine on gastrointestinal medicine. Further, Dr. Dakil pulled back on her initial "diagnosis" and, on cross examination, admitted this was only a "functioning diagnosis" (which sounds suspiciously like "I don't know") for which additional information would be needed – information she does not have. REC 144 (original diagnosis), 153 (modified diagnosis). There is a reason podiatrists do not opine on brain surgery.

> *"The evidence heard by the trial court demonstrated that Ashley Pardo had engaged in a pattern of reporting behaviors or symptoms that were subjective and could not be verified by the medical professionals."*

Not true. There was no such "pattern." However, the record evidence

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[3] *See* Dr. Dakil's recommendations found on Response, page 28, second paragraph. Note that Dr. Dakil nowhere suggests or recommends removal of KDP from his parents' care and custody. Thus, by removing KDP, a good argument can be made that CPS acted ***contrary to medical advice.***

clearly shows a parent concerned for her child's well being, who has had him seen by medical professionals, and who always – ***always*** – followed the advice of said professionals. KDP received no medical treatment, at any time, that was not recommended by physicians or other treating healthcare providers.

> *"As a result of these reports, the child was subjected to numerous tests, evaluations, and treatments."*

Numerous? It's true that KDP has been seen by several physicians over the last three years. But how many visits does CPS deem to be "excessive" enough to trigger their concern? 5? 10? 50? How is that number arrived at? Is that number the same for every child? Why that number and not another? Is this based on science or guesswork? And lest we forget: every medical procedure KDP has experienced, no matter the raw number, was prescribed by qualified medical personnel, and there is no evidence – or even allegation – otherwise. ***This*** "pattern" should have been conclusive for the trial court, but it was apparently not.

> *"The Relators' (sic) came to the attention of the Department as a result of their insistence that the child have an unnecessary G-tube surgery."*

Not true. Nowhere in the record will this Court find any evidence of any "insistence." Instead, the Court will find that the Pardos have taken KDP

to various specialists and have always – ***always*** – followed the medical advice provided to them. Unlike Dr. Dakil, the Pardos do not consider themselves qualified to opine on the medical "necessity" of future gastrointestinal procedures because it falls outside of their expertise. Instead, the Pardos ask qualified medical professionals for their opinions and then, like all fit parents, act accordingly.

> *"Upon her review of the child's medical records, Dr. Dakil became concerned that the child was at risk of having an unnecessary surgery if the Department did not intervene."*

Hyperbole. Dr. Dakil indeed became "concerned" but only to the point of wanting further information, and not to the point of recommending illegal and forceful removal of KDP from his parents' care and custody – which is itself a form of child abuse. Also, again, Dakil is not qualified to opine on the "necessity" of a G-tube procedure both because she is not qualified by specialty to make such an opinion and because prior to her report she had never even examined KDP – a requirement of medical ethics related to any such diagnosis.

> *"Absent active participation by the Relators' (sic) and given the urgency of ensuring that the child was not subjected to unnecessary medical procedures, the Department took action to bring the child into its protective care."*

Hyperbole. Again, no evidence supports the fear that KDP will have any

"unnecessary" medical treatment if he remains in the Pardos' care. And by "active participation," we know what the Department means: they want the Pardos to submit to government interrogation regarding their family when such an interrogation may well implicate the Pardos' Fifth Amendment right to avoid self-incrimination, and if they don't submit, they will not get their child back.

> *"Almost immediately, it became apparent that the child did not need the G-tube surgery, and he was a normal four year old child."*

Untrue. First, there is no evidence in the record from a qualified professional who has examine KDP that he either does, or does not, need any particular medical care. CPS's concern is not with care, but with their paranoia that KDP's parents might someday, somehow trick some unnamed surgeon into performing medical treatment on KDP that the unqualified "professionals" on CPS's side of this mess think might be "unnecessary."[4] Second, if KDP is a normal four year old child, why is he still in the hospital receiving evaluation and treatment, under a diagnosis

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[4] Isn't this nightmare scenario the same for every parent? Isn't the future unknown for all of us? If CPS is right here, all parents are at risk of having their children snatched based on an unsubstantiated claim that "something" detrimental might happen to their child in the future, and they can only get their child back if they prove it won't happen. "Dystopian" is too weak a word for such a government system.

of autism,[5] or in need of speech therapy?[6] Who countermanded his prescription for leg braces, which may well have been prescribed not to prevent his "tripping and falling over himself" (Response, p. 24), but to correct congenital abnormalities with his feet and gait?

> *"Efforts by the Department to enable the child's return were unsuccessful as the Relators' continued lack of communication coupled with the fact that the child was drastically different than (sic) he had been presented by the Relators made it clear that the child would be in continued danger if returned to Relators' care."*

Untrue ***and*** hyperbole. First, the record reveals the Department has made zero efforts to return KDP to his parents. Instead, the Department insists that the Pardos sacrifice their 5th Amendment rights to avoid possible self-incrimination in the face of state interrogation into a possible felony on pain of them not receiving the return of their child. This is precisely the same as a ransom demand made by a kidnapper: "Give us

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[5] Response, p. 16. Now Dr. Dakil is also a neurologist, capable of diagnosing that KDP's autism is "a very mild form of autism"? She is apparently also a nutritionist because she feels competent to opine on whether KDP was "overfed" and whether his weight loss is of any professional, medical concern. Response. p. 23.

It doesn't end with Dr. Dakil, but CASA supervisor Chris Hoffmeyer, who is not a physician, testified that the NG feeding tube was an "unnecessary medical procedure." Response, p. 24.

[6] Response, p. 15.

what we want, or you won't get your child back."[7] Second, there is no evidence in this record showing "continued" danger. For there to be "continued" danger, there must exist danger presently or in the past. Yet, there is no evidence that KDP was experiencing any threats to his health or safety, unless one considers it "danger" for concerned parents to attempt to get their child appropriate medical care by qualified physicians and then follow the professional advice they receive.

REPLY

The Pardos were following medical advice.

No fewer than 14 times the record demonstrates that all medical care provided to KDP was prescribed by physicians, and there is no evidence it was ever otherwise. Indeed, not only did the Pardos testify to these facts, but they are uncontested and even admitted by CPS throughout its Response. *See* Response, pp. 5 (medical advice that G-tube was not needed was followed by the Pardos)[8], 6 (NG tube inserted as

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[7] CPS's claim that it made these demands as "requests," (Response, pp. 31-32) is curious. Is it not bank robbery if the robber points a gun at the teller and "requests" the money?

[8] Response, p. 5: "At that time the doctors, who were not convinced that child (sic) needed a G-tube, were able to talk to the Pardos ***and it was agreed that they would wait and see how things went***."

Response, p. 8: "Dr. Dakil testified that as to the reported concerns of

(continued...)

prescribed by physician; additional feeding support agreed upon),[9] 7 (EEG tests prescribed by physician and undertaken), 8 (epilepsy testing prescribed by physician and undertaken), 9 (NG feeding tube discontinued on physician advice; agreement to feeding study), 11 (ceased feeding KDP solid foods on physician's advice; NG tube installed as prescribed), 12 (G-tube initially considered; agreement to follow general medical advice), 13 (leg braces prescribed and undertaken), 15 (developmental tests prescribed and undertaken), 19-20 (second opinions sought before brain surgery; advice followed).

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[8](...continued)
possible epilepsy, it was only after multiple EEGs that ***the Pardos accepted*** that the child did not have epilepsy."

Response, p. 9: "At that time, Ashley and Daniel [Pardo] ***agreed to continue other means of nutrition and see how things went***."

There are several other similar admissions in the record. Does this sound like parents who are ***ignoring*** medical advice?

[9] It cannot go unmentioned that CPS claims Dr. Anderson was fired because he recommended against the G-tube. Response, top of p. 6. This is categorically untrue. Dr. Anderson was fired for medical neglect because he refused to visit KDP while KDP was in the hospital. REC 84-85. Even Dr. Dakil testified that such neglect is "potentially" a valid reason to fire a physician. REC 159.

The statement in Dr. Dakil's report, REC 28, third paragraph, does ***not*** say Anderson was fired because he advised against the G-tube, and Anderson's alleged "concern" was apparently generated ***after*** he was fired. REC 158. Thus, we are unsure where CPS gets the support for this statement; it is clearly not based on anything the Pardos or Dr. Anderson said.

These are facts, not allegations. Any concerns that the Pardos had authorized, performed, or provided KDP with any medical treatment in the past that was not approved by physicians are hopelessly unfounded.

Since CPS's and Dr. Dakil's concerns relate solely to possible, future actions (i.e., somehow convincing an unknown physician to install an unnecessary G-tube), we cannot know for certain whether that will ever happen because the future is unknown. However, in predicting future actions, looking to past actions is frequently considered a guiding principle in forming such opinions. Here, all past actions prove conclusively and without dispute that the Pardos have done everything with KDP in compliance with medical advice. Why would the trial court suspect they might break from this pattern in the future? By making that suspicion the keystone of the July 24 order, the trial court abused its discretion by making a ruling unsupported by the only facts and guiding principles available to inform such a ruling.

Facts stated by Petitioners are true.

Initially, the Court will note that nowhere does CPS even allege – much less prove – that any of the facts set forth in Relators' Statement of Facts are untrue, or even argue that they might be subject to differing

interpretations. Instead, CPS elects to provide this Court with its own statement, the vast majority of which is mere regurgitation of ***allegations*** it made at the June 20 and July 2, 2019 hearings, allegations that are unsupported – just as they were at those hearings – by any facts or evidence. By failing to contradict Relators' Statement of Facts, CPS waives any contrary argument and the facts proffered by Relators must be accepted as true.

Allegations are not the same as facts.

Allegations are not evidence, a truism currently being ignored by CPS and its counsel. And repeated use of adjectives like "overwhelming" (Response, pp. 3, 35, 36, 41, 49, 57) does not transform mere allegations into actual evidence, either.

CPS makes two separate allegations: one relating to future possible medical care, and one related to an alleged failure to cooperate that supposedly precipitated an "emergency" situation requiring immediate removal of KDP from his parents. Neither allegation withstands scrutiny.

On the paranoia about "future unnecessary medical care," not only is no one on CPS's side of this matter qualified to opine on KDP's medical necessity for having a G-tube procedure, but this concern is not ***with the***

Pardos in any event. Rather, it's with some mysterious, unknown, unnamed, physician or surgeon who might perform an unnecessary surgical procedure, at some unknown future time, simply because a parent of a small child might ask for it. REC 177. Fear of such a future event – which is categorically CPS's entire case – is not only purely speculative (since there is no track record of the Pardos doing anything similar), but the speculation flies in the face of medical ethics and the common understanding of how medical procedures come about. CPS does not name this mystery physician, nor tell us when it might happen, nor prove that the Pardos were seeking such a caregiver. It is speculation by definition. In order for the trial court's concern to come to fruition, the Pardos would need to take KDP to a physician and then, somehow, convince that physician to perform medical procedures on KDP that the physician did not feel were medically necessary, simply on the request of his parents who are themselves not physicians. Is that concern reasonable? Or is it facially and utterly obtuse?

On the "failure to cooperate" allegation, the trial court may have missed the fact that the June 10 hospital admission didn't happen because

the Pardos did not even know about it.[10] The June 22 meeting was choreographed in large part by the Pardos' attorney, who was protecting his clients from what could have morphed into a government interrogation about a possible felony (i.e., child abuse). Invoking one's right to remain silent in the face of potential government prosecution based on accusations of wrongdoing is no indication of guilt, it is smart practice.[11] Even then, there is no proof the Pardos did not want to "cooperate" with CPS but for their attorney's advice. Is the trial court really finding that the Pardos "failed to cooperate" such that they lose their son by heeding their lawyer's advice?

There is no evidence of a "failure to cooperate" that would have triggered an emergency situation requiring removal of KDP from his

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[10] There was also an office visit scheduled for June 10, the same day Ashley was supposed to take KDP to the hospital. Why would CPS schedule both of those events on top of each other? The June 10 office visit did not happen both because CPS canceled it because a child advocate was not available.

And allegations that the June 10 events were somehow thwarted by Mr. Branson, the Pardos' attorney, are fanciful because Mr. Branson did not begin to assist the Pardos until June 11.

Finally, the June 18 meeting did not happen because CPS, in blatant and to-date-unexplained violation of state and federal law, refused to divulge to the Pardos the nature of the allegations against them and the Pardos' lawyer wisely refused to let his clients participate in such a "blind" meeting.

[11] In a criminal jury trial, it is prohibited to even comment on a defendant's choice not to testify, and such comments are automatic grounds for reversal of a guilty verdict.

home. Instead, CPS was angry that the Pardos did not pull down their pants for an intrusive, unfounded, and – as it turns out, illegal – intrusion into their family's personal business.

Even more disturbing are the statements found on Response, p. 32:

> Ms. Sims believed that "[c]ooperation with the family would be a big help" towards achieving the result of a successful reunification. RR 1:172, 180. Ms. Larry testified that should the Department be provided with the requested information and if it can be confirmed that there is no safety risk, the Department would then recommend that the child be returned to the Pardos. RR 1:215.
>
> ...
>
> Ms. Sims opined that the danger that brought the child into the Department's care continues as the Pardos have not met with the Department, the Department had not been able to get any type of social history, the Department has not seen the home, the child remains in the hospital, and the concerns "have not yet been lifted regarding this child." RR 1:176, 216.

These are absolutely stunning statements coming from one of the government agencies charged with protecting Texas families. Think about it: by following CPS recommendations, the trial court is insisting the Pardos not only give what could be incriminating testimony about their family, but is requiring this "cooperation" as a condition to return of their child, in place of following clear statutory and Constitutional directives that place the continuing burden of proof to show neglect or harm on CPS. By taking the child and ***then*** requiring the parents to prove they should

have the child back, the trial court imposed a complete reversal of the legitimate burdens of proof under the Family Code, and to make it worse, insisted on a logical impossibility.[12] Logically, a person cannot prove a negative (what did ***not*** happen; what psychological condition they do ***not*** have), which is why in the U.S. legal system the accusing party is burdened with proving what ***did*** happen. The trial court's order invokes a guilty-until-proven-innocent paradigm, and equates "failure to cooperate" in unfounded, intrusive investigations with an "emergency" unless and until the parents prove there is no emergency. Texas law is decidedly otherwise.

Until the state carries its heavy burden to prove neglect by parents or otherwise proves them to be unfit, parents are immune (or are supposed to be immune) from government intrusion into their family's life.

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[12] Lest we forget, KDP was initially taken from his home based on an *ex parte* hearing (June 20) at which the Pardos were not present.

Once the removal order was in place, the next hearing (July 2, 2019) produced evidence that not only had CPS overblown its concerns to Judge Gray at the June 20 hearing, but the actual evidence in the case positively proved that KDP was in zero danger if he was returned to his parents, the state failed to show any efforts made to return him, and the state failed to show that state custody was the only possible place KDP was able to live. The state thus failed to prove ***any*** of the three statutory requirements for keeping KDP in state custody have zero evidence supporting them. *See also*, Response, p. 20, where CPS admits that no alternatives to removal were even considered.

Here, CPS snatched the Pardos' child without cause, and now wants them to prove why they should get him back. Such a position by the government is beyond Orwellian and demonstrates exactly why courts are tasked with making sure that such fetid visions by irresponsible bureaucrats do not become a nightmare reality for parents. The trial court in this case failed in its duty to protect KDP and the Pardos, and mandamus should issue to correct that abuse of discretion.

PRAYER

Relators ask this Court to issue a writ of mandamus directing the trial court to vacate its order dated July 24, 2019, require that CPS return care, custody, and control of KDP to his parents immediately, and require the trial court to lift all restrictions on that care, custody, and control unless and until the State comes forward with substantial evidence that such an action is proper.

Relators also pray for such other and further relief as is just.

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CERTIFICATION

TRAP 9.4(i)(2)(C)

I certify that this Reply contains 4,273 words, and was created using WordPerfect X software, Century Schoolbook 14-point font (12 point in footnotes), converted to Adobe Acrobat portable document format (PDF), and is word-searchable.

/s/ James A. Pikl

CERTIFICATE OF SERVICE

I certify that on August 14, 2019, this Reply was e-served on counsel of record and parties as required by the Texas Rules of Appellate Procedure.

/s/ James A. Pikl